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NO. 87-849

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

ALABAMA BOARD OF PARDONS AND
PAROLES, EALON M. LAMBERT, JOHN
THOMAS PORTER, and RAY MORROW,
Members of the Board of Pardons
and Paroles of the State of
Alabama, and the
STATE OF ALABAMA,

PETITIONERS,

vs.

RICHARD MARK ELLARD,

RESPONDENT,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

REPLY BRIEF AND ARGUMENT OF PETITIONERS

OF

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I.

IN RE: LIBERTY INTEREST

The respondent argues that Section 15-22-24(i), Code of Alabama, 1975, was not passed until after his parole was

issued. See pages 12-13 of the Petition. Obviously, the Court of Criminal Appeals took this statute as codifying the Board's established practice, since the Board did not cite this statute to the Court of Criminal Appeals. This, however, is a state law issue.

The issue here is simple: whether a parole which does not affect the rate of service of concurrant sentences from different states and does not effect the convict's release to the free world but does affect the place where he serves the sentences, create a liberty interest within the meaning of the Consitution of the United States? This issue has been decided in this litigation in the negative by most of the courts which have reviewed it, but a majority of a panel of the Court of Appeals decided otherwise. How can the Respondent argue that this is not an issue in this case?

II.

IN RE: THE REJECTION OF THE STATE COURT INTERPRETATIONS OF STATE STATUTES

The petition points out that the divided panel of the Court of Appeals engaged in a detailed review of the state court interpretations of Alabama's parole statutes and, except for a single point, rejected them in favor of its own views. In so doing the panel ruled contrary to a two hundred year old policy of this Honorable Court, which had been re-affirmed and extended just a year before.[1] Now, the Respondent argues that the panel's action was justified in light of a point of state law, but the state courts ruled against the Respondent

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1. Posadas de P.R Asso. v. Tourism Co. of P.R. 478 U.S. ___, 92 L.Ed.2d 266, 106 S.Ct. 2968 (1966)

on this point, and this was the only point on which the Eleventh Circuit agreed with the state courts!

The issue here is separate from that of liberty interest. If the District Court erred in finding no liberty interest, the case ought to be remanded, but only to review the procedures by which the void parole was nullified,[2] not to review the relative merits of the Board's decision. The District Court would review the evidence before the Board only to determine if there is some evidence to support the Board's finding. If the District Court found a denial of procedural due process, it would issue

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2. It is undisputed that the Parole Board believed that it was required to comply with Morrissey v. Brewer (408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 [1972]) and edeavored to do so.

the writ, commanding that the procedural requirements be met, not issuing a parole.[3]

What gives rise to this second issue is the fact that the divided panel did not stop with remanding the cause for review of the procedures but ordered a review of the merits based on a totally new interpretation of the state statutes. The Petitioner says that the Court of

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3."...[w]e conclude the ends of justice will be best served by remanding the case to...the District Court with directions to make findings on the procedures actually followed by the Parole Board in these two revocations. If it is determined that petitioners admitted parole violations to the Parole Board, as Iowa contends, and if those violations are found to be reasonable grounds for revoking parole under state standards, that would end the matter. If the procedures followed by the Parole Board are found to meet the standards laid down in this opinion that, too, would dispose of the due process claims for these cases...." (Morrissey v. Brewer 408 U.S. 471, 490, 33 L.Ed.2d 484, 499-500, 92 S.Ct. 2593 [1972]; emphasis supplied)

Appeals was authorized to do this because Alabama parole statutes place "particularized standards and criteria on its parole board's ability to revoke" void paroles. The only standard expressly mentioned by Alabama's statutes for a parole's being void is that it was "...granted...contrary to the provisions of this article [i.e. the parole statutes]'...." Section 15-22-40, Code of Alabama, 1975. The standards are, then, the provisions of the Alabama parole statutes, and the issue is: What do these provisions mean, i.e. What they say, as held by the state courts, or something else, as held by the divided panel. The issue presented by the Petition is whether the Court of Appeals was authorized to impose these new interpretations on these statutes.

The argument presented by the Respondent in this Court was advanced by him in the State courts for the proposition that the Alabama Parole Board was not authorized to nullify a void parole.[7] The argument was rejected by the state courts and, on this one point, the Court of Appeals agreed.

The Respondent frankly acknowleges that the divided panel of the Court of Appeals rejected the state court interpretations of what Alabama's parole statutes say and substituted their own ideas of what the statutes ought to say.

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7. The Alabama statutes make no express provision for nullifying void paroles. In state court the Board argued that the power to nullify void orders is inherent in an administrative agency. 2 Am.Jur.2d, Administrative Law, Section 524; 73 A.L.R.2d 951, Section 5 The Board argued also that nullifying a void parole was analogous to a court's correcting a void sentence United States v. DiFancesco 449 U.S. 117, 66 L.Ed.2d 328, 101 S.Ct. 426 (1980); Murphy v. Massachusetts 177 U.S. 155, 44 L.Ed. 711, 20 S.Ct. 639 (1900)

This is a power which this Honorable Court has always held that it did not have. The issue here is then very simple: Does a United States Court of Appeals enjoy powers which are denied to this Honorable Court?

CONCLUSION

In conclusion, the Petitioners again respectfully submit that the Court of Appeals decided a novel question in a manner inconsistent with this Court's rulings and decided settled questions contrary to the policy of this Honorable Court. Therefore, the writ should issue, and the Petitioners again so pray.

Respectfully submitted,

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BY-

_____
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CERTIFICATE OF SERVICE

I, Joseph F. L. Marston, III, an Assistant Attorney General of Alabama, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and, as one of the Attorneys for the Petitioners, I hereby certify on this 5th day of February, 1988, I did serve the requisite number of copies of the foregoing on the Attorney for Richard Mark Ellard, Respondent, by mailing the same to said Attorney, first-class postage prepaid and addressed as follows:

Honorable Ralph I. Knowles, Jr.
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